Supreme Court, U.S.
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No. 09-513

In The
Supreme Court of the United States

JIM HENRY PERKINS AND JESSIE FRANK QUALLS,
Petitioners,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, ERIC SHINSEKI, IN HIS OFFICIAL CAPACITY AS SECRETARY OF VETERANS AFFAIRS, AND ROBERT T. HOWARD, IN HIS OFFICIAL CAPACITIES AS ASSISTANT SECRETARY FOR INFORMATION AND TECHNOLOGY AND CHIEF INFORMATION OFFICER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONERS' REPLY BRIEF

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Respondents concede every major point that counsels in favor of this Court's review. Respondents concede, as they must, the recurring and well-established split in the circuits on the precise question presented. Br. in Opp. 11-12. And they offer no possible scenario under which that split could be resolved without intervention of this Court. *Id.*

Respondents further implicitly concede that the question presented is an issue of national significance on an important question of federal law.[1] Respondents' suggestion that the conflict is a "narrow" one (Br. in Opp. 14) is belied by the fact that scores of federal agencies and millions of American citizens have a stake in what are "actual damages" under the Privacy Act, a point that Respondents do not dispute. Pet. 18-22. The United States, it seems, would like the issue to be addressed by this Court, but just not in this case given its egregious underlying facts and the Veterans' undisputed injuries. Pet. 4-8. However, no future case will offer a cleaner presentation of the issue for this Court's resolution.[2]

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[1] The United States has explicitly conceded this point in other proceedings. Pet. App. 42a.

[2] Importantly, Respondents do not dispute that the Veterans' injuries in this case are, in fact, "demonstrated mental injury, evidenced by traditional hallmarks such as physical manifestations and the need for prescription medication." Pet. 14. Thus, the question presented is a pure legal issue, with no complicating factual issues, as were present in *Doe v. Chao*, 540 U.S. 614 (2004). Pet. 13-14.

The one reason that Respondents offer against review—that this case is in an "interlocutory posture"—is makeweight and ill-founded. To be clear: the Privacy Act claims here are *not* in an interlocutory posture. *All* of the Veterans' claims under the Privacy Act have been dismissed by final judgment. Pet. App. 18a, 33a. There will be no further proceedings or lower court rulings on the issue of "actual damages," which is the only question presented for review. There simply will be no further development or maturation of this issue that would assist this Court in its review. The best that Respondents can say is that the facts underlying the Veterans' remaining Administrative Procedure Act ("APA") claims may be relevant to another *different* element of a Privacy Act claim—the "intentional or willful" element. Br. in Opp. 6-7 n.1. But the facts about Respondents' state of mind have nothing to do with the "actual damages" issue, and Respondents do not assert that they do. *Id.* Further, the Court of Appeals has specifically instructed the District Court, on remand of the APA claims, *not* to consider Respondents' mental state of mind or whether they intentionally or willfully violated the law. Pet. App. 12a-13a ("Thus, whether the VA consciously decided to violate the law is not a necessary consideration in evaluating whether it did violate the law."). The "interlocutory" objection raised by Respondents is a red herring that should not delay review.

Moreover, it was Respondents, not Petitioners, that put the issue of "actual damages" at the forefront of this case. At the District Court, Respondents moved for summary judgment—not on the "intentional or willful" issue—but on the "actual damages" issue. C.A. R. 33 at 55-59. The District Court granted Respondents'

summary judgment motion as to the Veterans' Privacy Act claims on this basis and this basis alone. Pet. App. 19a-33a. Given Respondents' own choice in how to proceed in defense of this case, they should not now be heard to complain that Petitioners are somehow jumping the gun.

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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